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February 27, 2003

Mary L. Cottrell, Secretary
Department of Telecommunications & Energy
Commonwealth of Massachusetts
One South Station, 2nd Floor
Boston, Massachusetts 02110

Re: DTE 02-45 — Global NAPs/VZN Arbitration

Dear Ms. Cottrell:

This letter responds to the letter dated February 26 in the above-captioned matter from Keefe Clemons of Verizon. Mr. Clemons takes issue with Global NAPs' attaching conditions to its execution of the interconnection agreement recently arbitrated by the Department (among other matters). Mr. Clemons asserts that Global NAPs should be sanctioned for failure to cooperate with the Department by bearing Verizon's costs and attorneys fees.

Clearly, Verizon and Global NAPs, and perhaps Global NAPs and the Department, disagree about certain aspects of the law governing this situation — disagreements that affect the steps that Global NAPs must logically take to protect its legal rights in the somewhat peculiar circumstances of this case. I will try to state the dispute in a neutral manner in order to highlight the nature of the difficulty Global NAPs faces here.

At least as Global NAPs understands Verizon's position, Verizon is asserting that the Department's arbitration order (and the contract it drafted in light of that order) constitutes a defense, under Section 208 of the federal Communications Act, 47 U.S.C. § 208, to claims that Verizon is violating a binding FCC order relating to intercarrier compensation for purely interstate traffic. As my earlier letter to the Department (dated February 6) indicated, Global NAPs is actively pursuing, at the FCC, its claim that Verizon is violating (or, at least, asserting the right to violate) the FCC's order; indeed, the first mediation session regarding that dispute will take place tomorrow.

If Global NAPs' understanding of the FCC's underlying rules (and Verizon's position) is correct, then Verizon is asserting that a state regulator such as the DTE is empowered under Sections 251/ 252 of the Act to authorize violations of FCC rules relating to traffic that the FCC has expressly said is not subject to state commission authority, whether under Sections 251/252 or otherwise. It is hard to imagine the FCC sustaining such an assertion. But the point here is that Global NAPs has the legal right — quite apart from the Section 251/252 process — to ask the FCC to enforce its rules and enjoin Verizon from violating them. And if, in fact, the traffic at issue is not subject to state regulatory jurisdiction, then an FCC ruling favorable to GNAPs — not the content of the parties' interconnection agreement — will necessarily control the parties' relationship on this topic.

The matter might be clearer with a hypothetical example. Suppose that the Department, for some reason, concluded that the mere fact that Verizon uses physically ***intra***state facilities to provide ***interstate*** access services empowered the Department to set rates for those interstate access services. Suppose further that for some reason the Department concluded that the proper rate for that use of those physically intrastate facilities was $1.00 per minute, and ordered Verizon to charge, and IXCs to pay, $1.00 per minute for the use of the intrastate facilities for the purpose of providing interstate access service.

Such an order would, of course, be legally wrong; as a result, in due course it would be reversed by the courts. But in the meantime, could Verizon in fact ***charge*** $1.00 per minute for interstate access services that were provided using physically intrastate facilities, and would IXCs have any obligation whatsoever to pay it? The answer to both questions, obviously, is no. Verizon's interstate access tariff, on file with the FCC, controls what Verizon can charge for its interstate access services. Any attempt by Verizon to charge an amount other than the amount authorized by the FCC and included in Verizon's interstate tariffs would constitute a violation of the FCC's rules. That body would be fully authorized under the Communications Act to enforce those rules and forbid Verizon from charging anything other than its tariffed interstate access rates.

Legally, this hypothetical is indistinguishable from the situation between Verizon and Global NAPs here. Global NAPs, with all due respect, disagrees with certain aspects of the Department's rulings in this case and has sought review of those rulings from the courts. Global NAPs recognizes that the normal Section 251/252 process contemplates that a party that loses on some issues in arbitration will sign a contract embodying the terms with which it disagrees, and then seek relief in the courts. If that were all that was at issue between Verizon and Global NAPs, Global NAPs would not have included the additional language associated with its execution of the interconnection agreement.

But here, quite apart from whatever legal mistakes the Department may (or may not) have made, ***Verizon*** is asserting that the Department's orders in this matter (and the associated contract) affirmatively empower Verizon to violate binding rulings of the FCC. Global NAPs is pursuing at the FCC its remedies for Verizon's asserted intention to violate that body's binding rules. Indeed, it has invoked the FCC's "Accelerated Docket" procedures, in an effort to get the matter resolved as promptly as possible. While that matter is pending, however, Global NAPs is

quite concerned that it avoid taking steps that could in any way be misconstrued as acceding to the view — with which Global NAPs strongly disagrees — that any state regulatory order in a Section 251/252 arbitration can affect the operation of, or immunize an ILEC from liability for violations of, the FCC's rules regarding matters that the FCC has expressly said are not governed by Sections 251 and 252.[1]

This same concern is what led Global NAPs to adopt the Sprint agreement under Section 252(i). That agreement does not contain language analogous to that which Verizon is relying on here to justify its violation of the FCC's rules. Had Verizon acknowledged Global NAPs' adoption of that agreement, this entire dispute would have been moot (as I mentioned in my earlier letter).

The Department may well disagree with Global NAPs' views on the merits of what the FCC's rules require; Verizon certainly does. The issue at hand, however, is how to indicate — in an amendment to the contract language, in a qualification to Global NAPs' execution of it, or otherwise — (a) the fact that a fundamental disagreement between Verizon and Global NAPs exists (and, indeed, is pending at the FCC) with respect to the operation of the FCC's rules; and (b) the fact that Global NAPs reserves all of its rights, ***not merely with respect to potential court challenges to the substance of the Department's orders,*** but also with respect to its claim that certain aspects of the proposed contract are, in addition to being "wrong" in the normal sense, also void *ab initio* because they contradict binding FCC rules that dictate a particular result, and remove the entire relevant subject matter from the scope of the Section 251/252 process.

In sum, Global NAPs' actions in this case have not been in any way intended to interfere with the implementation of the Department's responsibilities under Sections 251/252 or to frustrate the arbitration process. Global NAPs in this case has been trying to (a) avoid a serious, contentious and potentially costly litigation with Verizon at the FCC over the matters alluded to here, and now, (b) given Verizon's unwillingness to avoid the dispute, to reserve its rights and preserve its positions with respect to that dispute. Global NAPs' actions have been compelled by the unusual legal position that Verizon appears to be taking, *viz.*, that the Department is

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[1] Note that the issue would be completely unaffected if — as Verizon suggests in this case — the Department were to rule that the contract "governs the parties' relationship in Massachusetts." *See* Clemons Letter at 2. This would be the equivalent, in the hypothetical presented in the text, of the Department declaring that its new $1.00/minute rate for interstate switched access service "governs the parties' relationship in Massachusetts." The problem arises because essentially every aspect of every jurisdictionally interstate telecommunications service (excepting, perhaps, service using satellites) physically takes place "in" some state or another. Except to the extent embraced by Sections 251/252, however, state regulatory jurisdiction simply does not extend to jurisdictionally interstate services — even services provided "in" that state. Global NAPs assumes that Verizon is not prepared to assert either that (a) the ISP-bound traffic at issue between the parties is jurisdictionally intrastate or (b) the ISP-bound traffic at issue between the parties is subject to Sections 251/252 (*i.e.*, that normal reciprocal compensation rules apply to it). Unless Verizon believes one of those things, however, then it logically ***must*** agree with Global NAPs that the ISP-bound traffic at issue here is jurisdictionally interstate and beyond the authority of the Department to address. In these circumstances, Global NAPs submits that Verizon's coyness about the jurisdictional status of the traffic at issue is not, in any respect, accidental.

somehow empowered under Sections 251/252 to authorize Verizon to violate with impunity binding FCC rules regarding a matter that the FCC has specifically held to be beyond the purview of state regulators operating under Sections 251/252.[2]

Global NAPs would welcome the opportunity to discuss this problem with both Verizon and the Department. Perhaps Verizon or the Department might have a means for dealing with this situation that does not prejudice Global NAPs' rights at the FCC. Perhaps consideration of this letter might clarify matters sufficiently so that Verizon's objection to Global NAPs' "execution under protest" would be dropped. Global NAPs and its counsel will make themselves available at any reasonable time for a conference call or meeting with Verizon and the Department if, in the Department's view, that would be helpful.

Please do not hesitate to contact me if you have any questions about this matter.

Respectfully Submitted,

Christopher W. Savage
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Counsel for
GLOBAL NAPS, INC.

cc: Keefe Clemons, Esq.

[2] Verizon itself has recognized in other jurisdictions that state regulators have no authority to vary any aspect of the FCC's rules regarding intercarrier compensation for ISP-bound traffic. In a filing before the California PUC — made ***after*** the Department issued its order in this case — Verizon stated that under the Communications Act, "the FCC has ***exclusive*** jurisdiction to establish the conditions under which its interim rate regime for Internet-bound traffic apply." Comments of Verizon California Inc. (U 1002 C) To Draft Arbitrator's Report, In the Matter of Verizon California Inc. (U 1002 C) for Arbitration of an Interconnection Agreement with Pac-West Telecomm, Inc. (U-5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996, at 5 (filed Jan. 23, 2003) (emphasis added) The Department may want to inquire of Verizon why it takes such different positions about the same legal question before different state regulators.